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No. 85-1304

IN THE

Supreme Court of the United States

October Term, 1985

SPANG & COMPANY, *Petitioner*

vs.

MATTHEW A. DELGROSSO, et al., *Respondents*

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION

DANIEL P. MCINTYRE
35 Community Drive
Augusta, Maine 04330

JOY E. KLOPP (Counsel of Record)
Five Gateway Center
Room 1302
Pittsburgh, Pennsylvania 15222
(412) 562-2535

Counsel for Respondents,
Matthew A. DelGrosso, et al.

17 HERBICK & HELD PRINTING COMPANY, PITTSBURGH, PA. 15233

23pp

QUESTION PRESENTED

Whether a court's interpretation of a particular collectively bargained Pension Agreement prohibiting an employer's recapture of surplus funds gives rise to an important national issue or presents a conflict among circuits, where the other circuits are merely affirming lower court interpretations of different agreements or plans.

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I. INTRODUCTION

With good reason, Spang's[1] petition would divert this Court's attention from its real quarrel with the decision below. For what discomforts Spang, and what determined the Third Circuit's decision, was the interpretation the Circuit placed on Spang's collective bargaining agreement. While Spang now claims to discern a "conflict" among the Circuits, the only "conflict" is that the Third Circuit interpreted a specific contract to prohibit reversion while other circuits, in *per curiam* decisions, have affirmed district court determinations that other, quite different contracts permit reversions. *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F. Supp. 257 (D. D.C. 1983), *aff'd without opinion*, 729 F.2d 863 (D.C. Cir. 1984); *Pollock v. Castrovinci*, 476 F. Supp. 606 (S.D. N.Y. 1979), *aff'd without opinion*, 622 F.2d 575 (2d Cir. 1980); *In Re C.D. Moyer Company Trust Fund*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1273, 1275 (3rd Cir. 1978).

Below, in our argument, we examine the purported "conflict" at somewhat greater length. Moreover, we attempt to correct Spang as to three points where its assertions tend to mislead, and hence, to confuse a proper analysis of this case: whether the Third Circuit correctly viewed Spang's plan as one which required defined contributions; whether the participants had adequately sought the remedy the Third Circuit ultimately ordered; and whether the Union "bargained away" the participants' right to the surplus.

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1. Herein, we refer to the petitioner as "Spang" or "the Company," to the respondents as the "participants" and to the United Steelworkers of America as the "Union." From time to time we refer to the parties' Joint Appendix filed with the Third Circuit. We identify it as "Jt. App."

II. STATEMENT OF THE CASE

Successive Pension Agreements negotiated with the United Steelworkers of America, required Spang, the employer, plan sponsor, administrator and fiduciary, to fund and maintain a pension plan for the benefit of employees in its Ferroslag Division. Jt. App. at 685, 717, 737. Under pre-1974 Pension Agreements, the Company was obligated to fund the plan's benefits through contractually specified contributions; e.g., 40¢ per hour worked by each employee. *See, e.g.*, Jt. App. at 730 and 758. The parties determined benefits after fixing the contribution level. Jt. App. at 280-81 and 283. With the plan substantially overfunded, the parties agreed in the 1974 negotiations to convert Spang's funding obligation to actuarially determined variable funding. Jt. App. at 256, 688 and 712. Thereafter, Spang only needed to contribute the amounts necessary to fund the described benefits. Jt. App. at 256-57 and 412. Spang never contributed another penny to the fund after the conversion. Jt. App. at 412. Thus, the fund consists entirely of fixed hourly contributions and investment proceeds thereon.

Since 1970 all Pension Agreements have unequivocally prohibited reversions to Spang. Jt. App. at 730, 758-762, and 860-863. The most recent 1980 Pension Agreement provides (as did earlier Agreements):

> 12.6 The contributions made by the Company hereunder may not, under any circumstances, revert to the Company. If this Pension Plan shall terminate, the funds under the Pension Fund shall be used in the manner provided in Section 13. Without in any way limiting the foregoing, neither the Company nor any Participant hereunder nor any beneficiaries nor persons claiming through them shall have any right, title or interest in or to any of the funds in the

Pension Fund, except as specifically provided in this Agreement.

* * *

13.3 In the event a plant is permanently shut down or a plant is relocated outside of the Geographical Area of its present operation, the assets of the fund established for the Pension Plan are to be allocated to each plant location in relationship to the contribution made on behalf of all Participants at such locations compared to the total Contributions made on behalf of all locations. From the funds so established, there shall be deducted:

(a) The reserves applicable to those Participants who have been transferred to other locations.

(b) Sufficient reserves to insure those persons then receiving benefits to continue to so receive them.

(c) Reserves to provide benefits for those entitled to benefits but who are not at that time receiving them.

(d) The remaining assets will be prorated among the remaining Participants in relation to each Participant's established seniority to the total seniority of all Participants for whom distribution is to be made.

* * *

Jt. App. at 860-63.

In the 1980 negotiations toward a new Pension Agreement, Spang proposed that the parties remove the prohibition against reversion and adopt instead a clause stating that upon termination or partial termination of the plan any balance remaining in the fund after allocations for vested and accrued benefits would be paid to the Company. Jt. App. at 235-38 and 324-25. The Union

rejected this proposal, insisting on retaining the prohibition against reversion of assets. Jt. App. at 238.

In 1981, however, Spang drafted several pension plan documents, dating them 1976, 1977 and 1980. Jt. App. at 353-57. These pension plans purported to provide for precisely the reversionary privileges the Union refused to grant to Spang in negotiations.[2]

Spang closed two of its Ferroslag Division facilities prior to 1980. Jt. App. at 264. On neither occasion did Spang appropriate any "surplus assets." Rather, all monies remained in the fund. Jt. App. at 689.

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2. The reversionary clause rejected in negotiations read:

> 13.3 If the assets in the Pension Trust Fund are more than sufficient to provide the full allocations as set forth in such subparagraphs (a) through (e) of Section 13.1, then any balance remaining in the Pension Trust Fund shall be paid to the Company.

The "1980 plan" secretly drafted by Spang read:

> (e) To the extent there remains a surplus of assets of the trust fund after fully funding all of the above-determined liabilities due to benefits payable under the Plan, such surplus shall be considered an actuarial surplus and shall be returned to the Company.
>
> Jt. App. at 324-25 and 153.

Spang's unilateral plan attempted to provide for reversion in other, indirect ways accurately described by the Third Circuit in its Opinion. *DelGrosso v. Spang & Co.*, 769 F.2d 928, 931 (3d Cir. 1985).

In July 1982, Spang closed the last Ferroslag plant in Lorain, Ohio. Jt. App. at 688. After setting aside monies to cover the present value of the vested and accrued benefits of the 51 Lorain participants, there remains a substantial surplus in the fund. Jt. App. at 1050. According to Spang, that surplus in August 1982 equaled approximately $700,000. Jt. App. at 1050; Brief of Appellee and Cross-Appellant at 8, filed January 21, 1985, in Nos. 84-3618 and 84-3644.

Participants claimed and the Third Circuit held that Spang breached its fiduciary duty when it unilaterally drafted plan documents which contravened the controlling Pension Agreement by purporting to arrogate to Spang a right to the surplus monies. Jt. App. at 15-17; *DelGrosso v. Spang & Co.*, 769 F.2d 928, 929 and 937 (3rd Cir. 1985). ERISA, 29 U.S.C. §1104(a)(1)(D).

III. ARGUMENT

The parties are in complete agreement over the principles of law that govern this case. We note the more salient points here:

1. *A contract regulating employees' benefit entitlement constitutes a document which, in ERISA's terms, governs the plan. 29 U.S.C. §1104(a)(1)(D).*

2. *Spang's negotiated Pension Agreement did, in fact, control its pension plan. The Pension Agreement provided with utter specificity that "the Plan shall be amended to provide as set forth" in the Pension Agreement.*

3. *ERISA forbids a reversion which violates a collectively bargained pension agreement.*[3]

Taken together, these undisputed propositions sharply focus the fundamental issue which this case presents: whether or not Spang's Pension Agreement restricted the Company's right to recapture assets. The Third Circuit found it did. Indeed the clause that prohibited reversion admitted of "not the slightest ambiguity" and was "simply not susceptible to a restrictive interpretation." *Delgrosso, supra,* 769 F.2d at 935 and 938.

In its petition here, Spang undertakes to demonstrate an error in the Third Circuit's interpretation. To be sure, Spang couches its presentation in terms of an "Important National Issue" and a "Conflict with the Results in Other Circuits." Petition ("Pet.") at 8. Yet, after removing the chaff, the argument's kernel is limp indeed:

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3. ERISA now prohibits the Pension Benefit Guaranty Corporation from proceeding with a plan termination which violates a collective bargaining agreement. ERISA, Sec. 4041(a)(3), 29 U.S.C. §1341(a)(3), as amended by the Single-Employer Pension Plan Amendments Act of 1986, P.L. 99-272.

other courts have interpreted other contracts and determined that the different language of those other contracts permitted reversion. *See,* cases cited *supra* at 1.

Spang's anti-reversion clause bears no relationship whatsoever to the language in *Washington-Baltimore* and *Pollock,* the decisions of the other Circuits on which Spang relies. The plan documents in those cases restate ERISA's "exclusive benefit" rule, saying, in essence, that funds may not be diverted to a purpose other than for the exclusive benefit of participants. Those Courts felt free to interpret this "boilerplate" language narrowly. *See, e.g., Washington-Baltimore, supra,* 555 F. Supp. at 261; *Pollock, supra,* 476 F. Supp. at 612. But Spang's Agreement flatly prohibits reversion, without reference to the "exclusive benefit" rule. The interpretation of such dissimilar contracts cannot create a conflict in the circuits.

Admittedly, Spang assesses the "strength" of the anti-reversion language of these other plans and rates some "much stronger than the agreement in this litigation." Pet. at 11. Apparently it attaches significance to, and sees a conflict in, the Third Circuit's gauging Spang's Agreement from a different vantage. In fact, Spang's different view merely illustrates an inherent characteristic of the interpretative function; it necessarily involves a subjective element. For while Spang understands the other courts to have confronted stronger clauses, the Third Circuit was equally adamant that it faced language that "unlike the anti-reversion clauses in those other cases, is simply not susceptible to a restrictive interpretation." *DelGrosso, supra,* 769 F.2d at 935.

Spang's disagreement with the Third Circuit's interpretation does not rise to the level of a nationally important question nor does it indicate a conflict between the

Circuits.[4] For all the courts, the Third Circuit as well as those district courts on whose *per curiam* affirmances Spang relies, agree on the controlling legal principles. Each of these district court opinions agree (1) that, in conformity with ERISA, an employer who would recapture plan assets must evidence a valid plan provision permitting reversion and (2) that a provision violative of an employer's contractual obligations will not pass muster. 29 U.S.C. §1344(d)(1)(c). *See, e.g., Washington-Baltimore, supra,* 555 F. Supp. at 259 and 263-64; *Pollock v. Castrovinci, supra,* 476 F. Supp. at 616-17. Similarly, confronted by a contention that reversion is in breach of a controlling plan document, each of those courts correctly categorized the resultant dispute as one of contract interpretation. *See, e.g., Washington-Baltimore, supra,* 555 F. Supp. at 260-61. Thus, there is no disagreement as to the principles which ultimately determine an employer's entitlement to reversion. There remains only Spang's contention that, though the Third Circuit concededly applied these very principles, it reached the wrong result.

For two reasons, this case is a most inappropriate one to review an interpretation of an anti-reversion

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4. Nor is "grave doubt" created by *DelGrosso* as to employers' reversionary rights. Pet. at 12. Spang's attempt to portray the supposed "conflict" as one which would "chill" employers desire to create new pension plans or fund such plans cautiously is spurious. The law is indisputably clear and simple to follow: an employer need only create a defined benefit plan which specifically provides for reversion of surplus assets (or negotiate a Pension Agreement expressly permitting reversion) and the legitimacy of a later reversion of surplus cannot be questioned. Spang's error was in trying to invoke ERISA's Section 4044(d) even though its collectively bargained Agreement prohibited reversion.

clause. First, given the unique facts here, the Third Circuit was palpably correct that Spang's Pension Agreement flatly prohibited reversion. Second, even were that interpretation questionable, other clauses in the Agreement resolve that doubt against Spang's claim to the surplus. Thus, the Circuit properly held that Spang failed its duty to observe the instruments controlling the plan when it prepared formalized plan documents that derogated from the Pension Agreement.

The Circuit's interpretation properly reflected the Pension Agreement's plain language as well as the history which undergirded that language. The Circuit focused on the clause which provided that "contributions made by the Company hereunder may not, under any circumstances, revert to the Company." If contributions meant the whole of the fund, then there could be no reversion.

A number of facts bore on the proper interpretation. First, the entire fund surplus derived from Spang's contributions pursuant to a collectively bargained formula that obligated it to pay a stated number of cents for each hour one of its employees worked. Though Spang and the Union later amended that obligation, requiring instead that Spang maintain the fund on an actuarially sound basis, Spang never contributed a cent subsequent to this change.[5] Jt. App. at 412. The existing fund, composed of Spang's cents-per-hour contributions and swelled by income on those contributions, continually exceeded plan liabilities.

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5. Throughout its petition, Spang invokes sympathy as one who, assuming the "risk of poor investment performance," nonetheless agreed "to be bound by the additional obligation . . . of potential indefinite funding." Pet. at 14, 16. Spang fails to note the calculated nature of its

The second significant fact was Spang's own recognition of the limits which the Pension Agreement imposed on it. For though Spang now claims that its Agreement permits reversion, in collective bargaining in 1980 Spang quite carefully proposed replacing the Agreement's prohibition against recapture with a provision permitting Spang to claim a reversion. Jt. App. at 235-38 and 324-25. The Union, however, rejected that proposal, opting to retain the clause that flatly prohibited Spang's recapturing surplus. Jt. App. at 238. It was in the face of this rejection at the bargaining table that Spang subsequently inserted a reversion clause in the plan it drafted.[6]

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risk. First, Spang structurally limited its risk when it limited its contractual liability to making the actuarially determined contributions. Pension Agreement, Sec. 12.4, Jt. App. at 65. That clause effectively limited its exposure for benefits to those guaranteed by Title IV of ERISA. *Nachman Corp. v. PBGC*, 446 U.S. 359, 384-86 (1980). Second, Spang accepted this "risk" fully aware of its entirely hypothetical nature. At the time of the conversion to "defined benefit" funding, the plan was so overfunded that it required no contributions. Jt. App. at 258-63, 336-338, and 688-89. Subsequently, Spang carefully preserved the surplus by refusing to negotiate even those pension benefit improvements which the fund could bear. Jt. App. at 679-681.

6. Spang insists that ERISA required that it draft a formal pension plan. This contention, standing alone, misleads. Though ERISA requires that plans be established pursuant to a written instrument, 29 U.S.C. §1102(a)(1), it does not forbid a Pension Agreement's fulfilling that office. *Cf., Murphy v. Heppenstall*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982); *Winpisinger v. Aurora Corp.*, 456 F. Supp. 559, 567 (N.D. Oh. 1978). Indeed, Spang's Pension Agreement did serve as the formalized plan until at least 1981. It was only then that Spang drew up "plans" and backdated them to 1976 and 1980. Below, Spang claimed the Pension Agreement could not validly serve as the plan because it lacked

Confronting these facts and reading the anti-reversion clause in light of other provisions in the Agreement, the Circuit concluded that the Pension Agreement, which by its terms barred Spang's recapturing any contributions, prohibited a reversion of the surplus.[7] While advocates can quibble over the rigor of the Circuit's interpretation, such a dispute will never implicate an important national question. And only because it gives "result" a caged meaning is Spang accurate in its assertion that the Third Circuit's "result" differs from that of other circuits. By result Spang means who prevails—the employer or the participants. But different results are predictable where the analysis rests on the interpretation of different agreements or plans and is shaped by different facts.

Even had the Circuit erred in construing the Agreement's recapture clause as a total prohibition on reversion, still the Agreement would support the Circuit's holding that Spang violated its §1104(a)(1)(D) fiduciary

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some provisions ERISA required. In this regard, we note that Spang and the Union purported to comply with ERISA when they added a number of required provisions in 1976. Jt. App. at 801. If these efforts did not suffice to maintain the plan's tax qualified status, then the Agreement itself embodied a procedure which the parties could utilize to make the necessary adjustments. That procedure, of course, foresaw mutual agreement as the proper means of modifying the Agreement. In short, nothing in ERISA mandated the particular course Spang followed: the unilateral drafting of a plan, concealing its drafting from the Union, and adorning it with a variety of clauses that served no one's interests other than Spang's.

7. Spang slyly suggests that the Circuit limited its holding to that portion of the surplus attributable to Lorain. We note our objection solely to preserve our rights should Spang subsequently resurrect this brazen misstatement of the Circuit's decision.

duty by drafting a formal plan in contravention of the controlling plan documents. For other of the Agreement's provisions also fettered Spang's freedom to claim a reversion. First, the Agreement purported to allocate all the funds, not merely contributions, upon termination.[8] Moreover, the Agreement flatly precluded Spang's raising any extra-contractual claim to the funds, stating that the Company shall have no "right, title or interest in or to *any* of the funds in the Pension Fund, *except as specifically provided in this Agreement.*" Jt. App. at 66 (emphasis supplied). In short, the Agreement occupied the field completely, leaving Spang no loop-hole through which to weave its claim to a reversion. These provisions then, lend added emphasis to the Circuit's holding that "any plan provision permitting reversion is not 'in accordance with the documents and instruments governing the plan' under ERISA Section 1104(a)(1)(D), and any plan provision so providing is ineffective. It follows that

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We note here, also, Spang's suggestion that payment of benefits will consume all the Lorain contributions. This assertion is both speculative and irrelevant. Neither the Agreement nor the "plan" earmarks contributions as the first source of benefit payments. Only Spang, the fiduciary administrator, gleans this hierarchy in the plan. It does so since even Spang recognizes the prohibition against its recapture of "contributions," a recognition which requires that it eradicate the label "contributions" from the sums it would appropriate. In the end, this intricate accounting lacks any relevance. Since the plan lacks a valid reversion clause, ERISA allocates the entire surplus among all the plan participants. 29 C.F.R. §2628.—32(a).

8. Its Section 12.6 provided:

"If this Pension Plan shall terminate, the funds under the Pension Plan shall be used in the manner provided in Section 13." Jt. App. at 66.

Spang breached its fiduciary duty by failing to administer the Plan in accordance with the governing documents, i.e., the Pension Agreement." 769 F.2d at 735-36.[9]

As we noted initially, we close our response by correcting just three of the assertions Spang makes that tend to mislead this Court and confuse the issue. The first is the contention that the Circuit erred when describing Spang's as a "defined contribution" plan. The second is Spang's suggestion that the Circuit imposed a remedy foreign to any relief the participants' had sought.

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9. In a footnote, Pet. at 10, n. 10, Spang suggests this holding contradicts an otherwise unanimous body of doctrine that "the creation and termination of a plan are not fiduciary functions under ERISA." Spang ignores, however, that it was not "creating" a plan when it secretly and unilaterally drafted its plan document. A reticulated plan already existed, embodied in the controlling Agreement which commanded conformity to its terms. This removed Spang's discretion as to what the plan said. Spang's self-serving reversion clause is hardly the only term Spang added to its plan. We mention but one other: a clause which permitted Spang to tap the pension funds to meet the Company's completely independent obligation to provide retiree health insurance. *DelGrosso, supra*, 769 F.2d at 931. Such self-dealing directly violates ERISA's exclusive benefit rule. *See, e.g., Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

The "creation of plan" cases which Spang cites offer it no comfort since its conduct was not creation, but transcribing. In assessing its conduct, this Court's decisions in *United Mineworkers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 574 (1982) and *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) offer far more relevant guidance: once an employer leaves the bargaining table he must adhere to the bargain he struck at the risk of breaching the fiduciary duty ERISA imposes.

The third is the Company's insistence that the participants' Union bargained away their right to the fund.

Measured against ERISA's definitions, the Third Circuit arguably erred in describing Spang's pre-1974 pension arrangements as a defined contribution plan. In fact, since the plan specified a benefit formula, post-ERISA jurisprudence would undoubtedly classify it as a defined benefit plan. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979). Spang is an unseemly critic of the Circuit's choice of language, however, since Spang itself introduced this ambiguous usage into the case.[10] Indeed,

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Spang also incorrectly asserts that decisions relating to plan termination are within the sole discretion of the fiduciary and outside the fiduciary duty standards. Pet. at 10, n. 10. Certainly, the fiduciary's right to terminate the plan may be limited by contract. *See, e.g.*, ERISA, Sec. 4041(a)(3), 29 U.S.C. §1341(a)(3); *Maas v. Dubuque Packing Co.*, 754 F.2d 287 (8th Cir. 1985), *on rhg.*, 757 F.2d 194 (1985). In addition, the Department of Labor emphasized in a recent letter that "activities undertaken to implement the termination decision are generally fiduciary in nature" and thus subject to fiduciary strictures. DOL Op. Letter, 13 *BNA Pension Reporter* 472-73 (March 17, 1986). The Department went further, citing the *DelGrosso* opinion for the proposition that fiduciary standards may indeed govern the decision to terminate a collectively bargained plan. *Id.*

10. In its very first narrative of fact, Spang asserted that: "In the 1974 pension agreement covering Lorain and Chicago, Spang and the Steelworkers agreed to change the pension benefit provided from a 'defined contribution' to a 'defined benefit.' " Defendant's Brief In Support Of Its Motion To Dismiss, filed June 26, 1983 in C.A. No. 82-2672 in the United States District Court for the Western District of Pennsylvania. Spang persisted in this characterization of the pre-1974 plan. Jt. App. at 203, lines 19-22; 254, lines 19-24; 393, lines 2-7. Spang

it was not until petitioning for rehearing that Spang objected to the label. Spang's acquiescence is understandable, however, since no one disputed the more significant fact that the Circuit expressed through the shorthand "defined contribution." Prior to 1974, Spang paid into the plan an agreed upon number of cents-per-hour.[11] The entirety of the plan's funds today derive from contributions made before 1974, "pursuant to a defined contribution agreement."[12] 769 F.2d at 935; *see, also,* Jt. App. at 688. That undisputed fact, to the Circuit's mind, eviscerated Spang's prudent funder argument. Spang simply could not wrap itself in the mantle of the prudent funder as all it had done was make the contributions required by

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even characterized the plan in this manner in its opening brief to the Third Circuit. See, Brief of Appellee and Cross-Appellant at 32, n. 12.

11. Indeed, in those days the parties determined benefits only after agreeing upon the contributions. Jt. App. at 280-1 and 283.

12. Spang asserts that "actuarial error" is a concept of sufficient breadth to account even for its surplus. To be sure, the *general* rule classifies any excess assets as an actuarial surplus. Ronald A. Pearlman, Assistant Secretary of the Treasury for Tax Policy, 12 *BNA Pension Reporter* 482, 484 (April 1, 1985). Whether the general rule applies to Spang's surplus is, however, an open question and one whose answer, given the extraordinarily peculiar facts involved, is unlikely to instruct as to more common situations. For no actuarial determinations dictated any of Spang's contributions, these flowing instead from the economic package it struck with the Union. Benefits were determined after the contributions were set. Jt. App. at 280 and 283. As noted, the subsequent actuarially based funding provision never required any contributions. Spang's claim of actuarial error, absent any actuarial determination, is simply too removed from the typical situation to raise issues of broad concern.

an Agreement that expressly precluded its recapture of those contributions.

Spang also asserts that the Circuit ordered a remedy which the participants had not sought. This assertion lacks even the grace of literal correctness, since the participants prayed for the very relief the Circuit ordered. In essence, the Circuit reformed the plan and ordered the appointment of a disinterested fiduciary, noting that that fiduciary could terminate the plan and disburse the surplus pursuant to the very rule which governs such disbursements where no plan provision obtains. *DelGrosso, supra*, 769 F.2d at 938. In their Complaint, Plaintiffs sought, among other relief, appointment of an independent administrator and reformation of the plan. 769 F.2d at 932; Jt. App. at 17-18. Throughout this litigation, Plaintiffs repeatedly asserted that—if they failed in their own claim to the surplus—the appropriate remedy was appointment of an administrator who could distribute the pro-rata share to all participants.[13] Though Spang now claims surprise, its Pre-Trial Narrative cautiously responds to the participants' request for an independent

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13. *See, e.g.*, Plaintiffs' Reply Brief In Support Of Plaintiffs' Motion For Summary Judgment And In Opposition To Defendant's Cross Motion For Summary Judgment, at 20, n. 11 and 28, n. 20, filed October 31, 1983; Brief In Support Of Plaintiffs' Motion For Summary Judgment On Count IV, at 3-5 and n. 2 and 3, filed July 9, 1984; Defendant's Brief In Opposition To Plaintiffs' Motion For Summary Judgment, at 4, n. 1 (wherein Defendant responds to Plaintiffs' assertion), filed July 27, 1984; and Plaintiffs' Reply Brief In Support Of Plaintiffs' Motion For Summary Judgment On Count IV And In Opposition To Defendant's Motion For Summary Judgment, at 3, n. 1, filed July 30, 1984, all filed in the United States District Court for the Western District of Pennsylvania in Civil Action No. 82-2672.

administrator. Jt. App. at 635. Spang is simply in error in suggesting otherwise.

Spang's final assertion is perhaps its most devious. It suggests that the Union "negotiated away the benefit of the investment performance on the cents-per-hour contributions." Pet. at 16. For one reason, we welcome that assertion since it demonstrates Spang's recognition that, at least prior to 1974, the Agreement assigned to the participants the entirety of the fund, both the contributions and the income they produced. The record discloses no point, however, at which the Union bargained this interest away. The parties bargained but one change relevant to funding: that which relieved Spang of its cents-per-hour obligation and substituted the actuarially based formula that produced no contributions. Consistently, the parties renewed the prohibition against Spang's recapture and the Agreement's explicit articulation that Spang had no interest in any of the funds. The Union rejected, and Spang withdrew, a bargaining proposal that would grant Spang a right to the surplus. This bargaining history simply will not support Spang's assertion that the Union negotiated away "the benefit of the investment performance on the cents-per-hour contributions" which Spang concedes the participants had earlier enjoyed.

IV. CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

DANIEL P. MCINTYRE
35 Community Drive
Augusta, Maine 04330

Joy E. Klopp
Five Gateway Center
Room 1302
Pittsburgh, Pennsylvania 15222
(412) 562-2535

Counsel for Respondents,
Matthew A. DelGrosso, et al.

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